No. 83-625

IN THE

Supreme Court of the United States

October Term, 1983

JAMES D. GRIFFIN, The Mayor, and THE COMMON COUNCIL OF THE CITY OF BUFFALO, NEW YORK,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, NEW YORK; COMMUNITY ADVISORY BOARD FOR BILINGUAL EDUCATION OF BUFFALO, *ET AL.*,
Respondents,

and

GEORGE ARTHUR, *ET AL.*; and the NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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Question Presented

Should this Court grant a petition to review an Opinion of the Second Circuit Court of Appeals which, while acknowledging the usefulness of additional detail, deferred to the District Court's reliance upon the unrebutted, good faith, professional representations of qualified, responsible school officials in determining the amount of additional money needed from their co-defendants (Petitioners) in order to comply with desegregation orders of the District Court previously approved by the Second Circuit?

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The Facts

Petitioners "Statement of the Case" grossly misrepresents the record in several respects.[1] Since Petitioner's exaggerations and inaccuracies do not relate to the basis for the decision of the Circuit Court we shall not at this time restate the facts. For the purposes of this response we rely upon the facts as related by the Second Circuit (App. 3a *et seq.*).

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[1] For instance, the record does not contain "... lists of potential cuts ..." (totaling more than $22 million) "... which cuts could be made without interfering with any desegregation order of the court ..." (Petition page 11). Nor did anyone testify "... that the $7.4 million figure was selected by Trial Counsel ..." (Petition pages 9 and 10), or that Counsel instructed "... that the O & M request should be $156.5 million ..." (Petition page 12), or that the Board's "Budget analysts" recommended an O & M Budget of $150.5 million (Petition pages 12 and 21). Further there is nothing in the Opinion being appealed from which directs Petitioners to appropriate additional tax revenues to pay for an "interdistrict" remedy (Petition pages 24 and 25); and nothing in the record to support Petitioner's assertion that "... The extra millions of dollars were to be used to 'entice' or lure suburban non-district students into the City district, ..." (Petition page 25). These and other inaccurate portrayals are apparent even by examination of the references supplied by Petitioners. Whether or not intended to be misleading, they are; even as is the reference by Petitioner (Petition page 24) to the Second Circuit's denial of a stay in a context which gives the appearance that the quoted language immediately following was uttered by the Court when the stay was denied.

Reasons for Not Granting the Petition

As more fully developed below this is simply a case of one defendant being unwilling to appropriate available funds to another defendant because it did not approve of the manner in which the latter defendant was complying with the school desegregation orders of the U.S. District Court.

Based upon a review of the evidence presented to the trial court the Second Circuit Court of Appeals was absolutely justified in holding that:

> We cannot say that the District Court erred in accepting the Board's scaled-down estimate that $7.4 million additional funds were needed. Even with this addition, the Board's budget was approximately $5 million less than its $162 million request (App. 13a).

The Second Circuit has reviewed elements of this litigation four times since 1976. Twice this Court has denied certiorari. The District Court Chief Judge John T. Curtin has been the trial judge in this matter since its inception in 1972. There is no cause for this Court's supervision.

The attempt by Petitioners and Amicus City of St. Louis to demonstrate a conflict between appellate Courts by equating an Eighth Circuit ruling on a motion for stay to the Second Circuit's judgment on the merits is illustrative of the extent to which the bounds of credulity have been expanded by Petitioners in a desperate effort to avoid the simple conclusion that no complex principles of law are here involved. In the lower Courts this matter was decided consistent with the evidence presented.

ARGUMENT

I

The Decision Below is Clearly Correct

In anticipation of further disputes between these co-Defendants the Second Circuit observed that the District Court in the future "... may find it useful to enlist the aid of a neutral auditor, experienced in school budgeting, to assist in analysis of the figures presented" (App. 13a). The absence of such analysis was *not* an obstacle to affirmance of the District Court, however, because Associate Superintendent Murray was "... very specific in detailing the cuts he believed would have to be made without the added funds"; and "... Chief Judge Curtin found that the Board's federal funding would decrease by more than $10 million. And at the same time that the Board was receiving less federal funds, it was obliged to expend additional money to comply with obligations for the education of handicapped and Spanish-speaking children." (App. 13a). According to the Second Circuit Court:

> These developments support the District Court's conclusion that the City's initial appropriation ... would not enable the Board satisfactorily to proceed with implementation of Phase *IIIX* (App. 13a, 14a).

Nothing was presented by Petitioners to rebut the testimony of Mr. Murray. Nor did Petitioners seek before Chief Judge Curtin to challenge the need for high quality education programs as a part of the attraction to magnet school and other school desegregation techniques being implemented by the school district.

As recognized by the District Court and specifically noted by the Second Circuit:

> "... it is more costly to achieve desegregation through a plan that relies heavily on the voluntary preferences of parents to send their children, White and Black, to high quality schools, than simply to pay for the bussing of children to distant schools. The Buffalo Board of Education deserves commendation for the course it is pursuing, and the District Court has not erred in determining that in 1982-83 it needed an *additional* 7.4 million to *continue its progress.*" (emphasis supplied) (App. 15a, 47a).

Thus, the decision of the Second Circuit Court of Appeals was based upon the unrefuted facts found by the District Court as they related to the 1982-83 school desegregation program. Those facts were clear enough to cause the District Court to conclude and to cause the Circuit Court to affirm the need for at least 7.4 million *additional* dollars.

II

There is No Conflict of Decisions

Neither Petitioners nor Amicus, City of St. Louis disclose any decision of this Court or any other Court which is in conflict with the opinion of the Second Circuit.

Petitioners' attempts to portray a "partial" and/or a "potential" conflict between the Eighth Circuit order in *Liddell, et al. v. City of St. Louis,* No. 83-2118 Eighth Circuit, September 13, 1983 (App. 96a) and the Second Circuit growing out of the Eighth Circuit's stay of "... any order increasing the City Board's tax rate ..." (App. 105a) must fail on a comparison of the facts.

There is no issue here of the taxing authority or level of taxes to be imposed upon Buffalo citizens. No such

issues were raised in the Courts below. Petitioners were not ordered, nor did they find it necessary, to raise taxes in order to provide the $7.4 million additional required by the opinion of the Second Circuit. Nothing in the order of the District Court or the opinion of the Second Circuit can be construed as a "tax order" (Amicus brief pp. 2 and 3) (App. 100a-105a).

The facts here do *not* present an opportunity for the Court to revisit *Griffin v. County School Board*, 377 U.S. 218 (1964); *Milliken v. Bradley*, 418 U.S. 717 (1973) and 433 U.S. 267 (1977); or *Hills v. Gautreaux*, 425 U.S. 284 (1976). Whether or not such opportunity will arise following the *en banc* opinion of the Eighth Circuit in *Liddell* is speculative (See Amicus brief footnote 2 page 8) but is not dependent upon or related to disposition of the instant petition.

III

There is No Important Question of Federal Law

This case grows out of what at the time was the most recent funding dispute between two defendants. One defendant (Board) has the responsibility and authority to come forward with and to make work "now" a desegregation plan acceptable to the District Court. The other defendant (Petitioner) has control of the purse strings.

One defendant (Board) has exhibited such good faith in meeting its obligations that both the Circuit Court and the District Court have forthrightly acclaimed it (App. 9a, 15a, 21a, 22a, 30a, 32a, 33a).

There is no question that Petitioners had the ability to pay more money toward the desegregation plan implementation. Petitioners have not asserted an

inability to pay; nor has there been any challenge by Petitioners to the finding by Chief Judge Curtin that:

> The Mayor's task as codefendant in the lawsuit was to familiarize himself with the needs of the Board, vis-a-vis, the desegregation program. He should have affirmatively inquired as to what was necessary, what the program entailed, what were the Board's needs with regard to those programs mandated by other court orders and by the state and federal regulations. The focus of his inquiry should have been: *how much money is necessary to enable the Board to carry out the mandates of this court and its other commitments*? *It is clear from the testimony that the Mayor failed to make any such inquiries* (emphasis supplied) (App. 50a).
>
> The record indicates that, except for attending the formal presentations made by Mr. Murray and Mr. Reville during the public hearings, *neither the Mayor nor any member of his staff made an effort to ascertain exactly what was needed to carry out the desegregation orders.* That the Mayor could have obtained the information is evident from prior events in the case (emphasis supplied) (App. 50a).
>
> Nowhere in his consideration is there any indication that the Mayor took into account the specific needs of the Board regarding the increased cost of complying with the desegregation order in the face of dwindling federal funds and the need for increased funds to comply with this court's orders in the *Andres* and *Bushey* cases regarding handicapped children (App. 55a).

Thus, the granting of this petition would enable the Supreme Court only to raise the "squabble" between the Mayor and the Board of Education to an unwarranted level with no benefit to distant litigants extant or potential.

As already directed by the District Court and the Second Circuit the co-defendants in this matter must find a way to resolve their funding disputes and end the role of the Courts (App. 15a, fn. 17, App. 66a). But *if* there is recurrence the Second Circuit has already determined a method by which these parties may more specifically delineate the equity of their positions:

> When the School Board seeks the aid of the District Court in ordering the appropriation of additional funds to comply with a court-ordered remedy, it will normally be helpful to see precisely how the Board would expect to spend the level of funding it asserts is inadequate. Such a presentation would reveal not only the items the Board expects to drop from its initial budget estimate, but also the items it expects to retain. No doubt such a presentation would afford the City officials an opportunity to level specified criticisms at various expenditures the Board proposed to make, but such criticisms are not the equivalent of a power to "dictate" the manner of spending. Instead, they simply afford the District Court, and a reviewing court, a focused opportunity to determine how much of the Board's additional request is justified. Whether or not the Board persuades the Court that all or a portion of the requested funds are needed, it is not bound to accede to the City's objections concerning specific expenditure items.
>
> Should a dispute of this nature recur, we think it will normally be helpful if those who seek a court order for additional funding, and those who oppose such an order, supply the District Court with considerable detail reflecting the proposed expenditures in the absence of the additional funds claimed to be needed. Faced with such presentations, the District Court may find it useful to enlist the aid of a neutral auditor, experienced in school budgeting, to assist in analysis of the figures presented (App. 12a, 13a).

Whether or not such dispute settling or dispute clarifying technique should be used or will work for these parties in their circumstance is obviously not an important question of federal law.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be denied.

January, 1984

Respectfully submitted,

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